

FEB 22 2006

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JESUS BARRIENTOS-MALDONADO,

Defendant - Appellant.

No. 05-10255

D.C. No. CR-04-00164-LRH/RA

MEMORANDUM^{*}

Appeal from the United States District Court
for the District of Nevada
Larry R. Hicks, District Judge, Presiding

Submitted February 17, 2006^{**}
San Francisco, California

Before: HALL, SILVERMAN, and GRABER, Circuit Judges.

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Jesus Barrientos-Maldonado appeals the district court's sentence of fifty-seven months of imprisonment and three years of supervised release for Unlawful Reentry by a Deported, Removed and/or Excluded Alien in violation of 8 U.S.C. § 1326. We have jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

Post-*Booker*, we review a sentence for “unreasonableness.” *United States v. Booker*, 125 S.Ct. 738, 765-66 (2005). We review the constitutionality of a sentence de novo. *United States v. Leon H.*, 365 F.3d 750, 752 (9th Cir. 2004).

Barrientos-Maldonado argues that the district court did not consider the factors set out in 18 U.S.C. § 3553 and that his sentence was unreasonable under *Booker*. However, at sentencing the district court explicitly stated that it had considered the statutory factors. Barrientos-Maldonado does not contest his prior aggravated felony conviction for Possession with Intent to Manufacture or Deliver Heroin or his related deportation. Under 8 U.S.C. § 1326(b)(2), this prior conviction and deportation authorize a statutory maximum term of imprisonment of twenty years. Given the district court's recognition of Barrientos-Maldonado's “very serious” criminal history, his sentence of fifty-seven months, which is at the low end of the advisory Sentencing Guidelines, is not unreasonable.

Barrientos-Maldonado also challenges his sentence on Sixth Amendment grounds, arguing that any fact beyond the mere fact of conviction that justifies

increased punishment under 8 U.S.C. § 1326(b)(2) must be proved beyond a reasonable doubt. This claim is precluded by *Almendarez-Torres v. United States*, 523 U.S. 224, 226-27 (1998), and *United States v. Pacheco-Zepeda*, 234 F.3d 411, 414 (9th Cir. 2001). Contrary to Barrientos-Maldonado’s challenges, *Almendarez-Torres* remains good law. See *Pacheco-Zepeda*, 234 F.3d at 414 (holding that *Almendarez-Torres* is “dispositive” in rejecting a Sixth Amendment *Apprendi* challenge to an 8 U.S.C. § 1326(b)(2) sentence enhancement). Accordingly, we reject Barrientos-Maldonado’s Sixth Amendment challenge to the sentence enhancement.

AFFIRMED.